

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**Lehman College Center For
The Performing Arts**

Employer

and

Case No. 2-RC-23282

**Theatrical Stage Employees Local
Union No. One, IATSE, AFL-CIO, CLC**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding,¹ it is found that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that Lehman College Center for the Performing Arts (Employer) is a domestic corporation with an office and place of business located at 250 Bedford Park Boulevard, West Bronx, New York, the sole facility involved herein, and is engaged in management and operation of a center for the

¹ Briefs, filed by Counsel to the Union and the Employer, have been carefully considered.

performing arts. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$1,000,000 and purchases and receives goods, materials and services valued in excess of \$5,000 directly from suppliers located outside New York State. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Theatrical Stage Employees, Local No. One, IATSE, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner amended its petition at the hearing to clarify that it seeks to represent all stage hands employed by the Employer, but excluding all other employees, including wardrobe, catering and hospitality employees, and guards, professional employees and supervisors as defined in the Act. The Employer contends that the petitioned-for unit is inappropriate and must include the wardrobe and catering employees which positions are internally classified by the Employer as stage hands. Additionally, the Employer would apply the eligibility formula defined by the Board in *American Zoetrope*, while the Petitioner would apply the Board's *Davison- Paxon* formula.

The Employer's Operation

The Employer is a not-for-profit organization established pursuant to Section 501(c) of the Internal Revenue Code and operates a 2,300 seat theatre on the campus of Lehman College of the City University of New York, Bronx, New York. The Executive Director is a CUNY employee, as is the associate director and the technical director, a position that has been vacant since the first week of May 2008. The Employer has four full-time employees who are paid by it. They are the operations director, the marketing assistant and two box office assistants. The theatre building, which is the larger of two theatres on the Lehman College campus², is owned by the New York State Dormitory Authority and operates under the aegis of a board of directors. Eva Bornstein, the Executive director, reports to Milton Santiago, Assistant to Lehman College President Dr. Ricardo Fernandez. She also reports to Fr. Richard Gorman who presently serves as president of the Board of Directors.

The purpose of the Employer is intricately intertwined with the two communities it serves. As it is located on a college campus, in part it serves the needs of the college. In this regard, the theater serves as the venue for the Lehman College graduation, houses the College Chorus concert, which performs twice each academic year, and various lectures sponsored by the College. The Employer also serves the broader Bronx community in which the campus is located. In this regard, it houses the services of the Church of Christ on three Sundays each month. In all, the Executive director estimated the Employer holds approximately 100 events³ during the theater's season which runs from October to June each year. Of these 100 events, approximately 25

² The Levenger Theatre, which is operated by Lehman College, is a 500 seat theatre that is housed on the Lehman College Campus and has its own managerial staff. No employees of Levenger are involved in this petition.

³ The payroll records establish that there is double that number of events which results in the hire of stage hands.

involved performances by individuals who were called headliners. Performers, such as Johnny Mathis, Robert Klein, Joan Rivers and Natalie Cole, have performed at the theatre recently. Also Randall, a pop star from the Philippines, and dance troupes, such as the Japanese Modern Dancers have also appeared.

Operations Director Janet Sanchez reports to the Executive Director. She is responsible for the daily operation of the theatre which she referred to as the Concert Hall Building. In this capacity, Ms. Sanchez is responsible for the processing of the payroll. She receives times sheets for the ushers, stage hands, wardrobe assistants and caterers and prepares a bi-weekly payroll sheet which is submitted to ADP for printing of checks. She makes those pay checks available for pickup at the box office window on nights of performances for stage hands and ushers. If necessary, she will arrange to have the check mailed. Ms. Sanchez also is responsible for the box office staff, marketing, and works what she called the “front of the house” for all events.

As the Employer has reassigned Jonathan Quitt, the technical director hired on October 1, 2007, to other duties effective on May 7, 2008, the duties of the technical director have been personally handled by Ms. Bornstein. The technical director is responsible for all facets of staging the scheduled event at the theatre, whether it is a headliner show, a lecture, a commercial sales event or a religious service. The headliner’s event involves a contractual arrangement between the Employer and the performer. Attendant to this arrangement is a separate technical rider which sets forth all the requirements of the performer from sound, lighting, music and background to the catering for the dressing room and parking or transportation. The technical director is responsible for implementing the rider’s specifications. This position is also responsible

for the care and maintenance of the facility including the stage rigging, in-house lighting system, mechanical systems, spot lights, the rental equipment that is utilized, the aerial access equipment and the dressing room facilities.

The technical director is also responsible for the staffing requirements for the show. This includes the hiring of stage hands who handle the staging of the show, including the movement of scenery, drapes, lighting and movement of costumes if costume changes are to be done in proximity to the stage, as well as knocking down the staging at the end of the performance or event. The technical director also hires the ward robe assistants and catering assistants used in shows.⁴ The record does not describe much with respect to the duties of the ward robe assistants and caterers whom the Employer includes in the classification of stage hand for payroll purposes. While the stage hands, who do traditional stage hand work at and near the stage, such as lighting, sound, movement of scenery and other equipment, are paid in a range of \$16 to \$28 per hour depending upon their experience and expertise, the wardrobe assistants and caterers are paid just \$16 per hour, the same as the most inexperienced stage hand. The record only indicates the barest of interaction between the stage hands and the wardrobe assistants. The wardrobe assistants never do traditional stage hand work and stage hands never perform the ward robe duties. The only example of contact between these two groups occurred for the performance of “Swan Lake”, a ballet, and “Evita” which required that the stage hands move the costume gondolas up onto the stage.

The Employer has implemented significant changes in the individuals who have been hired as stage hands starting in October 2007. Ms. Bornstein testified that the

⁴ Some of the catering is done by the Lehman College food service provider, the Panda House. Although precisely when hospitality services are provided is unclear in the record, those employees are not the subject of this petition.

stage hands used by the technical director prior to October 2007 were completely unacceptable to her and she wanted Mr. Quitt who assumed the technical director duties on October 1, 2007 to create a new list using his industry contacts. Mr. Quitt testified that he took some time to evaluate some of the incumbent stage hands, but immediately started amassing a new list of stage hands with their contact numbers. When Mr. Quitt was transferred to a new position in early May 2008, he provided a list of some 50 names and phone numbers to Ms. Bornstein as she undertook the duties of the technical director. A list containing the names of some 82 stage hands, wardrobe assistants and caterers was placed into evidence during the hearing by the Employer.

Frequency of work by stagehands

During Mr. Quitt's tenure as the technical director commencing on October 1, 2007, he testified that he had an immediate need for stage hands and notwithstanding Ms. Bornstein's directive that he not use any of the previous stage hands, he began a period of evaluation. The payroll records entered into evidence establish that Mr. Quitt has retained four stage hands who were employed prior to October 1, 2007 and who worked through the year.⁵ The records further demonstrate that 6 names appear in the payroll records that worked two or three shifts after October 1, 2007, but never worked again after October 5, 2007. Another 4 stage hands worked at least two shifts after October 1, 2007, but never worked after October 14, 2007. Two additional names appear for 2 and 5 shifts respectively after October 1, 2007, but do not appear on the payroll again after October 27, 2007. Finally, two stage hands Keith Kavan and Gregory Press worked 44 shifts and 12 shifts respectively after October 1, 2007 but Mr. Kavan

⁵ These four are Victor Millian, Roy Alexander, Danny Rodriguez and Angel Ortiz.

does not work again after December 16, 2007 and Mr. Press does not work again after November 29, 2007.

Mr. Quitt testified that after finalizing his list, he routinely made the first call to four stage hands seeking their availability to work. If any of those four were not available, he would call six other specific stage hands. This group of 10 stagehands was the primary list used by Mr. Quitt. However, as many of this top group of highly skilled and very experienced stagehands is employed elsewhere as well, they are not always available to work. Thus, there are others who are routinely called for work and have a significant expectation of work with the Employer. All the events presented by the Employer involve just a single day of work (unless there is a show that requires set-up on the previous day). As such, the Employer is not in a position to offer long-term employment to stagehands. As a result the Employer has always maintained a large list of stagehands, whether it is the 50 person list of the previous technical director or the list of 82 now in use by the Employer.

I. Analysis

A. The bargaining unit

It is well established that the Act requires only that a petitioner seek an appropriate unit, and not the most appropriate or comprehensive unit. See *Capital Bakers*, 168 NLRB 904 (1967); *Morand Brothers Beverage Co.* 91 NLRB 409, *enfd*, 190 F. 2d 576 (7th Cir. 1950). In determining whether a unit is appropriate, the Board first considers the union's petition and whether the unit sought is appropriate. *Overnite Transportation Company*, 322 NLRB 723 (1996). A petitioner's desire concerning the composition of the unit which it seeks to represent constitutes a relevant consideration.

Marks Oxygen Company of Alabama, 147 NLRB 228 (1964). As has often been noted by the Board, the unit sought does not have to be the only appropriate unit, the most appropriate unit or the ultimate appropriate unit, only that it be an appropriate unit. *Bartlett Collins Co.*, 334 NLRB 484 (2002).

Nevertheless, for a bargaining unit to be appropriate, it has to be based on a community of interest shared by the employees. Nomenclature notwithstanding, what petitioned-for employees do, how functionally integrated it is with what other employees do, and the commonality of the conditions under which they work are essential in establishing a community of interest. The unit to be established has to fit the facts and not vice versa, *Kalamazoo Paper Box Co.*, 136 NLRB 134 (1962).

The Board generally attempts to select a unit that is the “smallest appropriate unit” encompassing the petitioned-for employee classifications.” *Overnite Transportation Co.*, 331 NLRB 662 (2000). In the circumstances here, I find that the petitioned-for unit of stagehands is an appropriate unit for collective-bargaining. The Employer contends that the wardrobe assistants and catering employees should also be eligible to vote. As such it appears that the Employer is contending that the petitioned-for unit is inappropriate and cannot stand alone. The Employer bases its argument for inclusion of the wardrobe assistants and the catering employees on the fact that it classifies these two positions as stagehands for payroll and contact list purposes, and that the technical director supervises them and the stage hands. Further, it contends that the pay rates for stage hands and wardrobe assistants is not dissimilar. It also notes that when costume changes require it, stagehands and wardrobe assistants work in close proximity to each other. I can not agree with the Employer that the exclusion of

these two categories of employees renders the petitioned-for unit inappropriate. On the contrary, I find that the record reveals that stagehands are a separate and distinct group and that the Employer has failed to establish that wardrobe assistants and catering employees share a sufficient community of interest with stagehands to require their inclusion in any unit found to be appropriate. I note that the record of contact between these groups is extremely limited. In the past year, there were only two shows that required the wardrobe gondola to be moved to the stage area where the stagehands worked. Moreover, the testimony regarding the amount of interaction between these two groups of employees was speculative and without any detail. This evidence in this record is insufficient to lead me to conclude that the petitioned-for unit is inappropriate.

B. *Voter Eligibility*

The Employer contends that the only appropriate formula for voter eligibility here would be the formula used in *American Zoetrope Productions, Inc.*, 207 NLRB 621 (1973) where the Board held that inasmuch as film industry jobs lasted only 1 or 2 days, the eligibility requirement for voting would be limited to two productions within the preceding year. The Union contends that the only appropriate formula here is the one the Board used in *Davison-Paxon*, 185 NLRB 21 (1970).

The Board most recently addressed this issue in *Steppenwolf Theatre Company*, 342 NLRB 69 (2004) which involved a small community based theatre in Chicago. In *Steppenwolf*, the Employer operated three theatres and presented performances throughout the year. In its three locations, the Employer presented plays that run for up to 8 to 9 weeks. The Board, in considering which eligibility formula to apply for the on call employees, held that the eligibility formula used must fit the unique conditions of the

particular industry in order to “permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer.” See *Trump Taj Mahal Casino*, 306 NLRB 294 (1992) The Board further noted in *Steppenwolf*, that its most widely-used formula for part-time and on-call employees is the *Davison-Paxon* formula, which is to be used “absent a showing of special circumstances.” It is evident that entertainment business has justified the use of special formulas suited to their unique circumstances. See *Julliard School*, 208 NLRB 153 (1974), *DIC Entertainment , L.P.*, 328 NLRB 660 (1999), *Medion, Inc.*, 200 NLRB 1013 (!972)and *American Zoetrope, supra*.

The Employer urges that I not apply the *Davis-Paxon* formula here as it maintains only about 20 employees would be eligible to vote from its contact list of 82. I am particularly cognizant that unlike *Steppenwolf*, where the Board remanded the case to the Regional Director to apply *Davison-Paxon*, this Employer does not hire stagehands for lengthy periods of time. This Employer’s needs and hiring pattern are clearly for very short durations as a result of events lasting but one day. I also note that the technical director testified that the people on the list that he amassed and gave to Ms. Bornstein are all stagehands in great demand and they are thus not always available. Therefore, in light of the nature of employment here, I find that the *Davison-Paxon* formula is too constrictive and disenfranchises stagehands that have a substantial and realistic expectation of continued employment. However, I also find that the formula proposed by the Employer would improperly enfranchise many individuals with absolutely no expectation of further employment. The testimony of both Ms. Bornstein and Mr. Quitt clearly establish that the Employer was dissatisfied with the

stagehands employed prior to October 1, 2007. The *American Zoetrope* formula suggested by the Employer would permit many individuals who are no longer considered for employment and who have not worked within six to eight months preceding this petition to vote. Such a result would undermine the Board's clear policy underlying eligibility formulas. Based on the unique facts of this case, I find that a modified *American Zoetrope* formula would be most appropriate to enfranchise employees with a reasonable expectation of work with the Employer. I would permit any stagehand who has worked at least two four-hour shifts from January 1, 2008 to the date hereof to vote. My review of the records and the testimony of Mr. Quitt confirm that there was a period of evaluation undertaken by Mr. Quitt to satisfy Ms. Bornstein's directive that a new stage hand contact list be created. There were twelve stage hands who were given the opportunity to work during October 2007 who never worked again. Also two other individuals worked after October 1, 2007, who never worked past the end of November and mid-December 2007. Therefore, the record establishes that the first three months of Mr. Quitt's tenure was the period of evaluation used to create the new list he was to use. I note that four stage hands that worked prior to October 1, 2007, proved satisfactory and were continued to be called for work into the New Year. I am convinced by the record that any stage hand who worked at least two of the 4-hour minimum shifts after January 1, 2008, has a reasonable expectation of continued work with the Employer and is eligible to vote in the election I am directing.

Based upon the entire record, I find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

Included: All stagehands employed at the Employer's facility located on the campus of Lehman College located at 250 Bedford Park Boulevard, West Bronx, New York.

Excluded: All other employees, wardrobe, catering and hospitality employees, and guards, professional employees and supervisors as defined in the Act.

NOTE: Those eligible to vote must have worked at least two 4-hour shifts with the Employer since January 1, 2008.

Direction of Election

An election by secret ballot⁶ shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time⁷ and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.⁸ Eligible to vote are those stage hands in the unit who were employed for at least two 4-hour shifts with the Employer since January 1, 2008 immediately preceding the date of the Decision. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are

⁶ The Employer in its brief has requested that the election here be conducted by mail ballot. That issue is not appropriately decided at this point in the processing of the petition. After the parties receive the Decision and Direction of Election, the Region will solicit the positions of the parties regarding the details for the election.

⁷ Pursuant to Section 101.21 of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

⁸ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁹ Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by Theatrical Stage Employees, Local No. One, IATSE, AFL-CIO, CLC.¹⁰

Dated at New York, New York
This 30th day of June 2008.

/s/ _____
Karen P. Fernbach
Acting Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

⁹ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **July 7, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In the event the Petitioner notifies me that it does not wish to proceed to an election in the unit found appropriate, the election eligibility list will not be provided to Petitioner.

¹⁰ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **July 14, 2008**.